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# TRACES OF A LIBERTARIAN THEORY OF PUNISHMENT

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## I.

Libertarians love free markets. An individual's right to exchange his property by mutual agreement with others is considered a first principle of libertarianism and the basis for the creation of wealth and the achievement of social prosperity. In fact, there are very few circumstances in which consensual deals among rights-holders would be impermissible. When problems arise in business dealings, libertarians find attractive the voluntary settlement of conflicts in lieu of legal action, possibly through mechanisms of alternative dispute resolution. Litigation is costly and unproductive, impeding free-market transactions and interposing the judgments of those who have no rightful claim over the dispute. Given the backlog in courts and a general distaste for centralized decision making, "it makes sense to try to work problems out without having a third party impose a solution."<sup>1</sup>

The same arguments would seem to apply in the arena of criminal justice and, in particular, to plea bargaining, the dominant means of resolving criminal cases in America today.

Plea bargains are preferable to mandatory litigation . . . because compromise is better than conflict. Settlements of civil cases make both sides better off; settlements of criminal cases do so too. Defendants have many procedural and substantive rights. By pleading guilty, they sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered.<sup>2</sup>

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1. DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 270 (1997).

2. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *YALE L.J.* 1969, 1975

How could a supporter of free markets object to a voluntary exchange like this, with the defendant trading his constitutional rights for the dismissal of charges or a reduced sentence? Assuming that the resulting punishment conforms with its espoused justification of punishment—supposedly retribution, or maybe compensation—the values of libertarianism would seem to be served in full.

In the following pages, I will suggest that this understanding is mistaken. A libertarian theory of punishment would not adopt a particular justification such as retributive deserts or utilitarian deterrence, and it certainly would not empower the state to impose its own substantive rationale on those whose rights are implicated. Nor would it authorize officials to trade in these individuals' rights without their consent, as can occur under the practice of plea bargaining. Instead, a true libertarian state would permit these individuals, especially victims and offenders, to resolve criminal cases pursuant to their own personal justifications for punishment, possibly by facilitating party interactions through processes like restorative justice. From the outset, however, it should be acknowledged that a comprehensive statement of a libertarian theory of punishment is far beyond the scope of this piece. All that can be done here is to outline a preliminary argument, undoubtedly with holes and rough spots, beginning with a brief summary of the underlying philosophy.

## II.

Like many other political theories, libertarianism is concerned with the use of force against individuals without their consent. It attempts to delineate rules or principles about the permissible interaction among free people, as well as between individuals and the state. Although frequently portrayed as "right-wing," libertarianism is suspicious of *all* forms of government action, whether it involves liberals reaching into a person's pocketbook or conservatives peering into someone's bedroom.<sup>3</sup> Indeed, libertarians come from a variety of perspectives in current political debates—some leaning to the right, others to the left<sup>4</sup>—all

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(1992) [hereinafter Easterbrook, *Plea Bargaining*].

3. Libertarianism is also referred to as "classical liberalism"—not to be confused with "modern liberalism" associated with, among other things, large-scale state redistribution of wealth.

4. Compare ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) [hereinafter NOZICK, ANARCHY] and MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982), with G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY (1995) and MICHAEL OTSUKA,

existing under a theoretical tent large enough to include both consequentialists and non-consequentialists.

Regardless of starting point and political bent, there is a general agreement that individuals are the fundamental unit of moral analysis and exercise full self-ownership. "Over himself, over his own body and mind," John Stuart Mill opined, "the individual is sovereign."<sup>5</sup> For consequentialist libertarians, from Mill to Milton Friedman, such autonomy is essential for human flourishing, maximizing both personal happiness and socioeconomic productivity in a comprehensive utility function.<sup>6</sup> For non-consequentialist libertarians like Robert Nozick, self-ownership is advocated not for its rule-utilitarian benefits but instead as a deontological principle,<sup>7</sup> sometimes premised on the Kantian categorical imperative that individuals be treated as ends in themselves and never merely as a means.

However it is arrived at, self-ownership signifies that an individual has the right to use his body and mind as he sees fit—to eat, drink, think, and say whatever he wants—more or less, complete discretion over his mental and material faculties consistent with the same right residing with all others. Self-ownership necessarily entails what are usually described as property rights, the power to determine the disposition of something, in this case, one's body and skills, applied through physical and intellectual labor. When these are mixed with justly acquired resources,<sup>8</sup> the resulting products are also owned by the individual, who in turn may use these goods or voluntarily transfer them to others.

The consequences of libertarianism often seem mundane and simplistic; for example, the choice to mow my own lawn, to contract

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LIBERTARIANISM WITHOUT INEQUALITY (2003). *See generally* LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000). Although the definition of libertarianism is highly contested, the following will try to provide an account premised on basic principles that seem to have some consensus among libertarian theorists.

5. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., Humanities Press 1991) (1859).

6. *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 59 (1995); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 4 (1962); CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN 18 (1997).

7. *See, e.g.*, NOZICK, ANARCHY, *supra* note 4, at 30–33; *see also* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 14 (1998) [hereinafter BARNETT, STRUCTURE OF LIBERTY].

8. Although not pertinent to the present discussion, this raises the issue of the initial acquisition of natural resources and, for instance, the so-called Lockean proviso that there be "enough and as good left in common for others." *See, e.g.*, NOZICK, ANARCHY, *supra* note 4, at 174–82; OTSUKA, *supra* note 4, at 22–29.

with my neighbor to do the same in his front yard, or to operate my own landscaping business. Other results trouble a significant slice of society but are begrudgingly (and only partially) permitted—the prerogative to consume my fill of nicotine, alcohol, and adult pornography, so long as no one else is endangered, as well as the ability to sell smokes, booze, and smut to willing adults.<sup>9</sup> Still other possibilities are prohibited throughout much of America, such as the freedom to produce, trade, and ingest various drugs (e.g., marijuana), to contract for sexual relations and enter games of chance (i.e., prostitution and gambling), and to end my own life voluntarily or hire someone to do it for me (e.g., euthanasia).<sup>10</sup> The essential claim in each of these cases is the same: a property right in one's self and personal belongings. And the libertarian basis for each transaction is identical: allowing "capitalist acts between consenting adults."<sup>11</sup>

Libertarianism thus embraces a particularly robust, anti-paternalistic conception of rights, which are held absolutely and equally by all individuals. To be clear, however, much of what contemporary discourse describes as a *right* would not be deemed as such by a libertarian.<sup>12</sup> There would be no "right" to health care, for instance, unless someone contracted for the relevant services, which would create a property right.<sup>13</sup> Moreover, there would be no "right" to prostitution per se, but instead complete self-ownership and the right of each

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9. Libertarianism does not contend, however, that those who lack the capacity to consent (e.g., children) must have the right to prostitute themselves, consume intoxicating substances, and so on.

10. There are exceptions. See, e.g., NEV. REV. STAT. § 201.354 (2006) (permitting "a licensed house of prostitution"); OR. REV. STAT. § 127.805 (2005) (allowing euthanasia); *Noy v. State*, 83 P.3d 538, 543 (Alaska Ct. App. 2003) (residential possession of less than four ounces of marijuana protected under state constitution).

11. NOZICK, *ANARCHY*, *supra* note 4, at 163; see also Murray N. Rothbard, *The Future of Capitalism*, in *MODERN POLITICAL ECONOMY* 419 (James H. Weaver ed., 1973).

12. See, e.g., BOAZ, *supra* note 1, at 64–65, 87–91.

13. A famous line of argument by Judith Jarvis Thomson, although on a different topic (abortion), seems apt here:

If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no right to be given the touch of Henry Fonda's cool hand on my fevered brow. It would be frightfully nice of him to fly in from the West Coast to provide it. It would be less nice, though no doubt well meant, if my friends flew out to the West Coast and carried Henry Fonda back with them. But I have no right at all against anybody that he should do this for me.

Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 55 (1971).

individual to control and use one's body. So conceived, libertarian rights do not vary by subject matter, and their advocates are unembarrassed by the upshot.

Some modern theorists have described rights as "trumps," "shields," and "side-constraints,"<sup>14</sup> but whatever the term, they are viewed by libertarians as inviolable, setting boundaries for action.<sup>15</sup> Rights thereby create a duty, an obligation of each individual to respect the rights of others. Someone's ownership of himself and his possessions places a moral constraint on my actions vis-à-vis that person's body and property, namely, I may not violate or otherwise interfere with his rights without his consent.<sup>16</sup> This nonaggression principle, as it is sometimes called, seems commonsensical and corresponds with the old adage that the right to swing my arm ends where your nose begins; actually, a libertarian would argue that my freedom lapses well before the tip of your nose, when a credible threat to violate your rights has been made. At that point, an individual may act in self-defense to prevent such an infringement. And if a violation has already occurred (e.g., someone stole my wallet), an individual is justified in using force to vindicate his right (e.g., my taking back the wallet).<sup>17</sup>

So far, so good. Libertarianism is haunted, however, by the specter of anarchy, that its conception of rights precludes government altogether. "So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do," Nozick posits in the preface to his magnum opus, *Anarchy, State, and Utopia*.<sup>18</sup> "How much room do individual rights leave for the state?"<sup>19</sup> No libertarian longs for a Hobbesian state of nature, where individuals reside in constant fear and life is "nasty, brutish, and short,"<sup>20</sup> but the question remains how a state would arise and persist while respecting these rights. Some theorists have attempted to resolve the issue through

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14. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) ("trumps"); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 428–31 (1993) ("shields"); NOZICK, *ANARCHY*, *supra* note 4, at 29 ("side-constraints").

15. In situations of "metaphysical emergency"—where human survival is in grave peril, such as mass famine—libertarian theorists concede that concerns about individual rights may be inapplicable. See, e.g., BOAZ, *supra* note 1, at 84–87.

16. See, e.g., BOAZ, *supra* note 1, at 74–76; NOZICK, *ANARCHY*, *supra* note 4, at 33–35.

17. See, e.g., BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 7, at 176–81 (discussing use of force to collect restitution or engage in self-defense).

18. NOZICK, *ANARCHY*, *supra* note 4, at ix.

19. *Id.*

20. THOMAS HOBBS, *LEVIATHAN* 82 (Michael Oakshott ed., Basil Blackwell 1960) (1651).

a social-contract metaphor, with individuals (hypothetically) agreeing to a type of minimal state in order to protect their rights (and nothing more),<sup>21</sup> thereby obligating themselves to provide sufficient resources for this limited government.<sup>22</sup>

Nozick takes a different approach, arguing that a libertarian minimal state would arise through an “invisible hand” mechanism, where individuals would contract with private firms to defend their rights. Eventually, a dominant protection agency would take on some core characteristics of a state, such as a monopoly on most forms of justifiable force and the protection of everyone within its jurisdiction.<sup>23</sup> But none of this stems from intrinsic authority of the agency or its successor state but only results from individuals enlisting it to defend their rights.<sup>24</sup> To be sure, the argument for a rights-protective minimal state is (concededly) ahistorical, and Nozick’s philosophical moves (e.g.,

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21. *Cf. infra* note 67 and accompanying text.

22. *See, e.g.*, JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* 21–23 (1975); JAN NARVESON, *THE LIBERTARIAN IDEA* 217–21 (1988).

23. *See* NOZICK, *ANARCHY*, *supra* note 4, at 10–146 (describing in detail “dominant protection agencies”). In the absence of the state, individuals would face the difficult, resource-intensive task of protecting their own rights, leading people to join together to form a protection association where each member would take his turn as watchman and the group would decide how to deal with rights violators. Although superior to the each-man-for-himself approach, the task of protection would remain unenviable for some, and in time, individuals would create private protection firms that would provide these services for a fee. Eventually, market competition would result in a single dominant protection agency (or a cartel of firms), which would protect their clientele and adjudicate disputes through rules and procedures agreed to by each client. The last move, which converts the dominant protection agency into a bona fide minimal state, responds to those few independents who do not contract for protection and instead enforce their rights outside of the system. The agency cannot allow them to use force against clientele in the absence of its own determination that a client has violated an independent’s rights and should be required to pay a consequence (e.g., compensation and punishment), yet this leaves the independent unable to protect his own rights or obtain a remedy. Such injustice can only be avoided by the dominant protection agency providing its services to the independents, who can be charged (i.e., taxed) in kind.

24. A subtle point should be made here. Nozick at times refers to individuals *contracting* with a protective agency/minimal state to protect their rights, but at other times he describes individuals *transferring* their rights to these entities. NOZICK, *ANARCHY*, *supra* note 4, at 89 (noting that “the legitimate powers of a protective association are merely the *sum* of the individual rights that its members or clients transfer to the association”). Maybe Nozick viewed an agreement with an agency/state to protect individual rights as synonymous with a transfer of such rights. *But cf.* Robert Paul Wolff, *Robert Nozick’s Derivation of the Minimal State*, 19 ARIZ. L. REV. 7, 23–24 (1977) (critiquing the idea of simple rights transfer). Although this might seem like mere semantics, an important issue is at stake: Libertarianism may be most compatible with the view that only individuals have rights and the state has none, at least intrinsically. For this reason, I will assume that individuals do not transfer their rights but instead contract with a minimal state to protect their rights, which individuals still maintain. A full exploration of this point is beyond the scope of this paper, however.

how he deals with independent hold-outs) may prove too clever for many.<sup>25</sup> On this score, however, his theory is not uniquely flawed; the social contractarians have major problems as well, such as the fictional nature of party agreement. In fact, both approaches are in good company, as all political theories will have some potential flaws duly identified by career critics. But regardless of such wrangling, libertarianism's conception of individual rights and limited government offers a compelling image of society that challenges the prevalent statism of American political discourse.

A libertarian minimal state—restricted to protecting a person's rights against force and theft by others—is not only just but inspirational,<sup>26</sup> libertarians suggest, particularly given the alternative. The more government acts, the more it adopts a distinct vision of the good life. For some, this may entail socialist-style welfare; others may seek Bible-beating religiosity; and still others may imagine hedonic decadence. But a state that enshrines a particular notion of the good necessarily impedes the pursuit of all others. In contrast, a minimal state limited to protecting people's rights offers a model for pluralism, where each individual is free to organize his life without interference in order to achieve his own private utopia. Libertarianism thus provides "a framework for utopias, a place where people are at liberty to join together voluntarily to pursue and attempt to realize their own vision of the good life in the ideal community but where no one can *impose* his own utopian vision upon others."<sup>27</sup> It is this unwavering opposition to paternalism—grounded in the freedom to live one's life without direction from an über-nanny—that is so appealing, even to those who enjoy the amenities of the modern state.

### III.

Needless to say, the foregoing offers only a broad brush sketch of libertarianism, admittedly incomplete and subject to all sorts of caveats.

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25. Among other things, some might suggest that Nozick's "invisible hand" account of the origins of the minimal state is no different than the "social contract" theory employed by both classical and contemporary philosophers (e.g., Locke and Rawls), with individuals contracting with protection agencies on the way to creating a government. However, it could be argued that only the invisible-hand mechanism ensures that no one's rights are violated in the process of state formation, for instance, and that social contractarianism requires one to stretch the metaphor "so that each pattern or state of affairs that arises from the disparate voluntary actions of separately acting individuals is viewed as arising from a *social compact*." NOZICK, *ANARCHY*, *supra* note 4, at 132.

26. *Id.* at ix.

27. *Id.* at 312.



But it provides a sufficient backdrop for present purposes and, in particular, for an inquiry into the libertarian implications for criminal justice. Some are well known and have been suggested above or follow directly from the theory's basic principles. The state would have no authority to act without a violation of a person's rights of self-ownership and private property, meaning that it could not prohibit what someone does to himself and his possessions, nor could it ban voluntary transactions among individuals. The notion of a "victimless crime" would cease to exist, for example, with self-regarding acts and free-market exchanges among adults—prostitution, gambling, the trade and consumption of drugs and sexually explicit materials, and so on—all being beyond official power. Instead, as Mill argued, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others,"<sup>28</sup> where that harm amounts to a violation of another's rights.

Additional aspects of criminal justice have been addressed from a libertarian perspective, such as the procedural requirements for the state to interfere with an individual's rights, from initial contact and questioning of a citizen by government officials, to searches and seizures of his person and possessions, to the process by which factual guilt is determined. At each of these points, American libertarians tend to err on the side of personal freedom—for instance, adamantly opposing new or expanded exceptions to Fourth Amendment safeguards.<sup>29</sup> What is far less developed, however, are the ramifications that flow from a properly investigated and established rights violation. If we assume that these acts are officially proscribed ("crimes") and require some undesirable state-imposed consequence ("punishment"), the question becomes the justificatory means to the appropriate outcome. To date, libertarian theory has no settled rationale for punishment and has been silent with regard to the process of sentencing. As Murray Rothbard observed three decades ago:

Few aspects of libertarian political theory are in less satisfactory state than the theory of punishment. Usually, libertarians have been content to assert or develop the axiom that no one may aggress against the person or property of another; what sanctions may be

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28. MILL, *supra* note 5, at 14. It should be noted, however, that Mill allowed for the possibility that public "offences against decency" might be prohibited. *Id.* at 108–09.

29. *E.g.*, Brief for the Cato Institute as Amicus Curiae Supporting Petitioners, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1369442.

taken against such an invader has been scarcely treated at all.<sup>30</sup>

Although the ensuing years have not witnessed a libertarian accord on punishment—akin to, say, the belief in self-ownership—there are points of concurrence, such as the obligation of convicted criminals to provide compensation for violating the rights of their victims. What this entails, however, is not always clear. Some theorists, such as Nozick, offer abstract terms for a compensatory regime—that a victim should be placed in as good a position as he would have occupied but for the violation of his rights—but not much more.<sup>31</sup> Other commentators agree with the general idea that a victim should be “made whole again,” yet the exact formulations of how this would be achieved are often quite different.

A thief must turn over the pilfered property, for sure, but it has been suggested that the same harm now must be done to him in turn—“two teeth for a tooth,”<sup>32</sup> some libertarians say. So in addition to disgorging the ill-gotten gain (the first “tooth”), the offender should forfeit his rights to the same degree as he violated those of another (the second “tooth”). For example, the larcenist would be required to return the stolen goods *and* shell out the value of the booty from his own wealth, with both “teeth” provided to the victim.<sup>33</sup> Moreover, the criminal must compensate the injured party for the fear and insecurity suffered as a result of the rights violation, and he must reimburse law enforcement for the costs of investigating the crime and apprehending the perpetrator.<sup>34</sup>

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30. ROTHBARD, *supra* note 4, at 85.

31. NOZICK, ANARCHY, *supra* note 4, at 57.

Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A. (In the terminology of economists, something compensates X for Y's act if receiving it leaves X on at least as high an indifference curve as he would have been on, without it, had Y not so acted.)

*Id.* Nozick also assumes that the victim will take “reasonable precautions and adjusting activities.” *Id.* at 58.

32. Roy Whitehead & Walter Block, *Taking the Assets of Criminals to Compensate Victims of Violence: A Legal and Philosophical Approach*, 5 J.L. SOC'Y 229, 246 (2003); see also ROTHBARD, *supra* note 4, at 88.

33. See ROTHBARD, *supra* note 4, at 88.

34. See *id.*; Whitehead & Block, *supra* note 32, at 246–47. In a sense, then, this theory calls for more than “two teeth.”

Others reject this methodology, suggesting that the victim must be reimbursed for the full value of his loss but not be overcompensated, recognizing that wrongdoing does not indiscriminately extinguish the offender's property rights, for instance, or out of concern for the rights of the wrongfully convicted.<sup>35</sup>

Randy Barnett has developed a particularly ingenious libertarian-based scheme that would provide victims an enforceable right to compensation—if necessary, through the paid employment of confined criminals.<sup>36</sup> He envisions this pure restitution system as a substitute for punishment, rejecting both consequentialist objectives like deterrence and non-consequentialist conceptions of retribution. Barnett does allow for preventative detention for those who present a credible threat of future rights violations, although he claims that this is based on an extended version of self-defense rather than punishment.<sup>37</sup> But whatever the label—punishment, defense of property rights, or maybe some hybrid we could call “propertyment”—the result is the same, incapacitation of the offender, a traditional objective of utilitarian punishment. Barnett thus seems at odds with libertarians who eschew consequentialist goals or view restitution as a necessary but insufficient criterion of justice for rights violations.<sup>38</sup>

In contrast, theorists like Nozick and Rothbard endorse a retributive approach based on the idea that offenders deserve to be punished. Both approve of retribution as setting an upper limit on the amount of punishment that can be inflicted, precluding sanctions that are disproportionate to the harm caused to the victim.<sup>39</sup> But they disagree on the appropriate rationale and the form punishment can take. For Rothbard, the animating principle appears to be rights vindication through retaliation—basically, a form of *lex talionis*—where the victim is authorized to impose the precise rights violation upon the offender:

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35. See, e.g., BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 7, at 200–05; see also ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 382 (1981) [hereinafter NOZICK, *PHILOSOPHICAL EXPLANATIONS*].

36. See BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 7, at 176–84, 200–05, 216–37; see also Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 349 (Randy E. Barnett & John Hagel III eds., 1977) [hereinafter Barnett, *Restitution*].

37. See BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 7, at 184–91, 213–15.

38. Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 *ETHICS* 348 (1978); ROTHBARD, *supra* note 4, at 88–95; Whitehead & Block, *supra* note 32, at 243–45.

39. See ROTHBARD, *supra* note 4, at 89–91; NOZICK, *ANARCHY*, *supra* note 4, at 60–63; NOZICK, *PHILOSOPHICAL EXPLANATIONS*, *supra* note 35, at 363–97.

For example, suppose that A has severely beaten B; B now has the right to beat up A as severely, or a bit more, or to hire someone or some organization to do the beating for him . . . .

The victim, then, has the right to exact punishment up to the proportional amount as determined by the extent of the crime . . . .<sup>40</sup>

Nozick eschews punishment for the purpose of retaliation, however, making a point to distinguish between retribution and revenge.<sup>41</sup> Instead, he conceives a retributive approach that seeks to reconnect the offender with the correct values that have been violated, where deserved punishment is a function of the wrongfulness of the act and a person's responsibility for it.<sup>42</sup> Under this ostensibly non-consequentialist rationale, "the role of suffering in punishment is not merely to ensure a significant effect in people's lives, but . . . to negate or lessen flouting by making it impossible to remain as pleased with one's previous anti-linkage."<sup>43</sup> It is unclear what types of punishment would be permissible under this philosophical framework.<sup>44</sup> But Nozick is unambiguous that, following Locke's concededly curious doctrine, everyone has a right to punish<sup>45</sup>—and most relevant for present

40. ROTHBARD, *supra* note 4, at 88–89; *see also* Whitehead & Block, *supra* note 32, at 246–48.

41. *See* NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 35, at 366–70. To a certain extent, Nozick's *Philosophical Explanations* fills a gap in *Anarchy, State, and Utopia*, which admittedly "does not contain a precise statement and justification of a theory of retributive punishment." NOZICK, ANARCHY, *supra* note 4, at xiv. Some might suggest, however, that Nozick had abandoned his libertarian position by the time he wrote *Philosophical Explanations*. *But cf.* James W. Harris, *Renowned Philosopher Robert Nozick: Still A Libertarian*, 6 THE LIBERATOR ONLINE, Aug. 11, 2001, <http://www.theadvocates.org/liberator/vol-06-num-15.htm> (quoting Nozick: "What I was really saying in [the 1989 book] 'The Examined Life' was that I was no longer as hardcore a libertarian as I had been before. But the rumors of my deviation (or apostasy!) from libertarianism were much exaggerated.").

42. *See* NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 35, at 363–65, 374–90; *see also* NOZICK, ANARCHY, *supra* note 4, at 59–63.

43. NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 35, at 384.

44. At times, Nozick speaks of "retributive matching penalties," which authorize the imposition of the same wrong or harm on the offender, and he seems to accept (but not necessarily advocate) capital punishment. *See, e.g.,* NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 35, at 364, 371, 373, 378; *see also* NOZICK, ANARCHY, *supra* note 4, at 60 n.\*. At other times, he suggests that there are limits to retribution (as compared to revenge) and "not every heinous act will be matched," NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 35, at 371 n.\*; apparently anticipating that incarceration will remain the primary form of punishment. *Id.* at 366–71, 388.

45. *See* NOZICK, ANARCHY, *supra* note 4, at 10, 137–42. *But cf.* David B. Lyons, *Rights*

purposes, “punishment is not owed to the victim . . . and so it is not something he has special authority over.”<sup>46</sup> Moreover, steps might have to be taken to exclude victims from interfering with the process of punishment, which otherwise would blur “the distinctness of retribution from revenge.”<sup>47</sup>

#### IV.

It is at this point that punishment theorists usually begin picking at each others’ approaches. Utilitarians will assail retribution as being willfully blind to the causes of crime and the consequences of punishment, for instance, and quixotic in its belief in a transcendental conversion chart of harmful wrongdoing to deserved penalties. But retributivists will note the equally whimsical nature of deterrence calculations, as well as the apparent willingness of their consequentialist rivals to punish the innocent if need be. Utilitarians may retort that “just deserts” is mere pretense for a barbaric settling of scores, with retributivists firing back that “rehabilitation” often serves as code for brainwashing and coerced medical treatment. In turn, retributivists will condemn selective incapacitation as immoral punishment for who someone is rather than what he has done, while utilitarians will find it just as immoral to sentence dangerous predators without concern for future victims.<sup>48</sup> And on and on it goes.

As suggested above, libertarians are no different. Some promote retribution, while others reject it. Those who spurn consequentialist goals and, in particular, deterrence, still find room for incapacitation under the guise of proactive self-defense. Prominent theorists who accept the right to punish nonetheless disagree as to where that right resides, with the victim or instead with society as a whole. And although libertarians generally support compensation, few details have been forthcoming beyond academic hypotheticals. The great irony, for me at least, is that the condition of the debate—the inability to settle basic issues of punishment and the indeterminacy or sometimes wooden nature of scholarly examples—should have been a warning signal to libertarians that the entire enterprise might be inconsistent with core

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*Against Humanity*, 85 PHIL. REV. 208, 210 (1976) (critiquing this concept).

46. NOZICK, *ANARCHY*, *supra* note 4, at 138.

47. NOZICK, *PHILOSOPHICAL EXPLANATIONS*, *supra* note 35, at 367.

48. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 205–27 (discussing punishment justifications and criticisms).

philosophical principles on which they do agree.

For a moment, let's pause to think about the idea that (1) there is a single correct justification of punishment that (2) empowers the state to impose undesirable consequences on offenders. As a matter of experience, the first claim has not worn well. The battle among punishment theorists is millennia old and shows no signs of resolution, with leading minds of each generation taking diametrically opposed positions—Becarria, Bentham, Hegel, and Kant in previous centuries, to name a few, and a litany of respected scholars in modern times. Having witnessed sometimes passionate debates among academic interlocutors championing their own favored rationales—just deserts, deterrence, communicative punishment, rehabilitation, and so on—it is hard not to conclude that people in good conscience can and will have different opinions about the purpose of the criminal sanction.<sup>49</sup> More importantly, that is exactly what should be expected in a free society, one consistent with libertarianism's dedication to pluralism of thought.

As for the second claim, an authentic minimal state need not, and therefore would not, impose any particular justification of punishment, implementing its own favored rationale over the will of affected parties. A common value of all libertarian philosophy is the freedom of each person to realize his own vision of the good life without interference from other individuals or collectives like the state. And just as an individual can be expected to have a plan on how to achieve his vision of the good, he is likely to have an idea of what justice requires in response

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49. In the words of Herbert Morris:

[W]hat surfaces in discussions of punishment is the unsettling fact that among individuals apprised of all the relevant facts, apparently intractable differences arise over what can and cannot serve as a justification. Some theorists, for example, view desert as fundamental. Others remain puzzled by the idea of people deserving a painful response and perplexed as to how one could ever rationally impose pain on someone because of what is past, rather than as a consequence of some good that is contemplated to come in the future. This difference in philosophic attitude, so persistent over time and so apparently resistant to modification, suggests a possibility that Nietzsche would have found quite plausible, namely that theoretical differences often are rooted in temperamental differences, that people are more or less deontologically or consequentially disposed. Whatever the explanation for this familiar and unresolved dispute over punishment and its justification, it would be unduly optimistic to predict anything like theoretical consensus.

Herbert Morris, *Concluding Remarks: The Future of Punishment*, 46 UCLA L. REV. 1927, 1930–31 (1999).

to a rights violation that interferes with his pursuit of personal utopia. To be told by the state that his justification of punishment is incorrect (or correct, for that matter) is the precise type of paternalism that libertarians should find insufferable. It is not that libertarianism embodies extreme relativism, where there are no right answers to issues like the rationale for punishment. Maybe there are such answers—and surely a given individual may believe that his own justification is superior to all others. Instead, libertarianism is committed to the notion that *the state* should not take a stance on moral issues such as this.

Does it all necessarily devolve into punishment anarchy? I think not, given libertarianism's conception of individual rights and a minimal state, supplemented by a few modest assumptions. Imagine the following hypothetical, which seems apropos given the site of this symposium: Without provocation or consent, a baseball player intentionally strikes someone with a bat during a Milwaukee Brewers game. The offending athlete has violated the self-ownership rights of another, who now may act in self-defense and/or vindicate his right to be free from aggression. For instance, he might seek some jail time for the offending ballplayer,<sup>50</sup> based on the extent of the damage inflicted, or instead, the victim might demand monetary compensation. The amount of harm caused would be case specific and nearly impossible to ascertain beforehand, and the appropriate response will depend on the justification of punishment. In contrast to the views of personal injury lawyers and dogged supporters of the federal sentencing guidelines,

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50. A commentator asked me how libertarianism could authorize jail time for a criminal, given its strong presumption against deprivations of liberty. But libertarianism should not be confused with pacifism:

Libertarians see themselves as defenders of rights; [and] the difference between rights and other sorts of moral claims lies in the fact that rights are legitimately enforceable. . . .

. . . [W]hat makes a moral claim a right rather than something else is precisely the fact that coercion may be used to enforce it. Whoever endorses radical pacifism, then, is committed to denying that anyone has any rights—a rather odd position for a libertarian to be in!

Roderick T. Long, *Punishment vs. Restitution*, FORMULATIONS, Winter 1993–1994 (emphasis omitted), available at <http://www.libertariannation.org/a/f1212.html>. In turn, there is no reason why libertarianism would eschew incarceration as a form of rights enforcement. See, e.g., BARNETT, STRUCTURE OF LIBERTY, *supra* note 7, at 184–93, 213–15; Pilon, *supra* note 38, at 355–56 (arguing that a crime “involved a violation of the victim’s dignity; the criminal intentionally used the victim for his own ends, and against the victim’s will,” and “[i]n so doing, the criminal alienated his own right against being similarly treated by the victim,” “thus creat[ing] a right in the victim (or his surrogate) to use the criminal as he himself was used”).

there is no precise moral calculus for every victim that converts crimes into financial restitution or incarcerative sentences.<sup>51</sup>

No one can assess in the abstract the physical and psychological damage from a rights violation. Consider the issue of compensation in the case of the battering ballplayer. Maybe the victim was a strapping young person who received only a bruise and is happy to be compensated with an autographed bat, possibly the offending weapon, as some type of memento. But maybe the casualty was a frail octogenarian who suffered a serious concussion, followed by horrible nightmares and the fearful life of a shut-in, all as a result of the incident. I'm not sure what amount of monetary restitution, if any, would compensate the latter victim, but I do know that the person who knows best, and should be intimately involved in that decision, is the injured party himself, the very person whose rights were violated. Moreover, a non-paternalistic state would not tell the victim that the appropriate stance is pure restitution and that his rights cannot be vindicated pursuant to retribution, deterrence, or whatever happens to be his own justification of punishment.

As such, a libertarian approach would not be compensation-or-bust, nor would it be all-desert-all-the-time. Although premised on a real fact pattern,<sup>52</sup> the above example is just as stilted as any other scholarly hypothetical and offered for the usual reason: to try to incite a particular reaction in the audience, in this case, an intuition among many that the appropriate punishment will be context sensitive. Compensation might do, but with a change of facts, incarceration might be appropriate pursuant to consequentialist or non-consequentialist goals. But now consider a brutal kidnapping and rape. My suspicion is that most Americans, imagining the type of response they would demand were they the victim, would find a pure restitutionary scheme to be repulsive for allowing the offender to buy his way out of justified punishment.<sup>53</sup> I

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51. Cf. Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005).

52. See *infra* notes 94–97 and accompanying text.

53. See, e.g., Pilon, *supra* note 38, at 351.

If a rich man rapes a rich woman, are we really to suppose that monetary damages will restore the status quo, will satisfy the claims of justice? A wealthy child molester will treat compensation simply as the price of pleasure! And what of the terrorist who murders, knowing that his wealthy backer will settle the account? The reduction of criminal wrongs to civil wrongs, in short, or at least the addressing of criminal wrongs with civil remedies, bespeaks an all too primitive view of what in fact is at issue



know that my own retributive instincts, curbed only by the contemporary limits of sanctioning (e.g., no torture), would lean toward an extremely long sentence, maybe even life imprisonment. But what if the actual victim is a prison abolitionist who only wants compensation for her medical bills: Who am I to say that her reasoning is wrong and the violation of her rights must be vindicated pursuant to my rationale?<sup>54</sup>

Once again, this hypothetical is staged with an objective: to arouse the natural response of many, that harsh punishment is called for, as well as the modern recognition that crimes like rape are extremely personal, implicating a severe violation of an individual's right to bodily integrity or, in libertarian terms, self-ownership. With such crimes, there is a well-based understanding that no one is entitled to tell the victim how she should feel, that she must forgive the offender or, conversely, hold vengeance in her heart. There is a tendency to personalize or even take ownership of the crime—for victims to refer to “my rape”—in a way that might sound strange if applied to different crimes (e.g., “my theft”). But what is true of the horrific rights violation of rape also applies to any other offense in a minimal state. It is not “a breach of the King's peace,” but the violation of an individual's rights. And that is why libertarianism should find it illegitimate for the state to impose *its* justification of punishment in opposition to the views of the victim and other affected individuals. The state has no rights itself and can only act to vindicate the rights of individuals.

Does this mean that the victim may demand any sanction, or none at all, applying his own justification of punishment to the rights violation at hand? That doesn't seem correct—the offender has rights, too, which have been forfeited only to the extent of his crime. He will have his own personal vision of justice, something that would inform a punishment rationale, and he surely has a vested interest in avoiding an excessive, rights-extinguishing sanction. And although not as direct or compelling as those of the victim and offender, the rights of others may be at stake in the resolution of a criminal episode. The commission of a crime may place third parties in fear for their lives and property, impeding full

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in the matter of crime.

*Id*; cf. Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691 (1998).

54. See, e.g., *Wallet Cards: A Way to Say No to the Death Penalty*, WASH. POST, Nov. 29, 1998, at A24 (discussing wallet cards carried by capital punishment opponents that say, “If I'm ever murdered, I want my killer punished—but not executed,” and suggesting the immorality of imposing the death penalty over the victim's wishes); see also Pilon, *supra* note 38, at 356–57.

enjoyment of such rights and fulfillment of their visions of the good life. It is this fear of future rights violations, either by the offender or others emboldened by the crime, that libertarian theorists like Barnett and Nozick offer as the reason for incarceration qua extended self-defense (for the former) or preventative restraint (for the latter).<sup>55</sup> "Others too are affected" by crime, Nozick argues, "they are made fearful and less secure if such crimes go unpunished."<sup>56</sup>

The problem is how to reach a just resolution given the potentially conflicting views of the victim, the offender, and other interested individuals, which is where a libertarian government may have a role. Might makes right in the theoretical state of nature, and disputes are resolved by private force, leading to undue punishment or, conversely, no sanction at all. Whether by social compact or Nozickian invisible-hand, a minimal state arises to replace the private feud by protecting and vindicating the rights of individuals. It might establish a fair process by which conflicting rights and punishment rationales—those of victims, offenders, and affected third parties—can be mediated toward a reasonable outcome. The state might even appoint an agent to represent these individuals if they were to choose not to participate in the process, or if the affected third parties were too diffuse or large in number. A victim may desire limited involvement in the criminal process or none at all, for example, and the residents of an entire neighborhood might be fear-struck by a particular crime. And should the mediation fail to resolve the matter, a neutral decision maker might be called upon to reach an appropriate punishment given the views of the interested parties.

But what a true libertarian state would not do is preclude the victim from participating in this process or dismiss entirely his opinion on punishment in favor of its own. The brutality of enforcement in the state of nature inspires the creation of government to end private

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55. See BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 7, at 184–91; NOZICK, *ANARCHY*, *supra* note 4 at 65–71, 142–46. Barnett would require substantive and procedural limitations on extended self-defense (e.g., only allowed against those who have committed prior criminal behavior), BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 7, at 213–14, while Nozick hypothesizes that preventative restraint would require compensation for those detained, which might only be possible "by setting aside a pleasant area for such persons" that is "luxurious enough to compensate someone for the disadvantages of being prohibited from living among others in the wider society." NOZICK, *ANARCHY*, *supra* note 4, at 143, 144.

56. NOZICK, *ANARCHY*, *supra* note 4, at 139; see also Daniel M. Farrell, *Punishment Without the State*, 22 *NOÛS* 437, 443–50 (1988); Margaret R. Holmgren, *Punishment as Restitution: The Rights of the Community*, *CRIM. JUST. ETHICS*, Winter/Spring 1983, at 36, 40.

feuding, but this hardly requires individuals to forego involvement in determinations about their rights or to empower the state to impose a justification of punishment irrespective of the opinions of those whose rights are in the balance. On the contrary, individuals would seem to have a type of property interest in the resolution of their rights (as will be discussed below), and there is no obvious reason why people would either want to or have to surrender this interest.<sup>57</sup> And in contrast to Nozick, “the fact that the victim was the one most affected by the crime” *does* “give him a special status with regard to punishing the offender[.]”<sup>58</sup> After all, it is the victim’s rights that have been violated and require vindication, not any right intrinsic in the state. As mentioned, a government official may act as an agent of the victim, if he so chooses, and maybe an official could represent a wide class of people whose rights have been put in jeopardy by future predations. But in Nozick’s words, “the state need not be so egomaniacal as to claim the sole right to decide moral questions,”<sup>59</sup> including, I believe, those involving punishment.

## V.

The practical consequences of a libertarian theory of punishment could be far-reaching, and the full implications are not at all clear to me at this point. But I want to try to bring this to bear on a pair of symposium topics, beginning with plea bargaining. Broadly defined, a

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57. Nozick apparently assumes that almost all activities related to the vindication of rights violations must be conducted by the state. *See, e.g.,* NOZICK, *ANARCHY*, *supra* note 4, at 118–19. It might be conceded that government has to maintain a monopoly on the use of force (except as needed for immediate self-defense), as well as the sole authority to determine issues of factual guilt—those things that must be conducted by the state alone to prevent private feuding and vigilantism, and to ensure that only the factually guilty are held to account. But what does not necessarily follow is that affected individuals must forego participation in the process of determining punishment: Fact-finding in criminal cases and enforcement of a given sanction are distinct and separable from the determination of an appropriate punishment. A convincing reason to exclude victims from the latter is not readily evident to me (because retaliatory violence is already precluded), nor is there one to explain why victims would necessarily abstain from involvement. Moreover, a full state monopoly on the decision-making process of punishment only seems plausible if victims “transfer” to the state all rights stemming from a violation of their rights, a claim that might result in the arguably non-libertarian notion of “state’s rights.” *See supra* note 24. Once again, however, an investigation of this issue is beyond the scope of the present work.

58. NOZICK, *ANARCHY*, *supra* note 4, at 139 (asking rhetorical question); *see, e.g.,* Barnett, *Restitution*, *supra* note 36, at 363 (“The armed robber did not rob society; he robbed the victim. His debt, therefore, is not to society; it is to the victim.”); Pilon, *supra* note 38, at 349, 353–57.

59. NOZICK, *ANARCHY*, *supra* note 4, at 24.

plea bargain involves a defendant agreeing to waive his trial rights in exchange for the government's assent to his pleading guilty to lesser crimes and/or receiving lower punishment than otherwise possible. Nationally, more than ninety percent of all convictions are obtained by plea bargain,<sup>60</sup> with some suggesting that the process is a necessary evil given America's enormous criminal docket and others describing it as the product of a law enforcement obsession with victory, backed by the weaponry to achieve it.<sup>61</sup> As detailed in a voluminous literature,<sup>62</sup> there are more problems with plea bargaining than you can shake a stick at, so to speak, many of which should trouble a libertarian.<sup>63</sup> But there is one issue that may be of special concern: the lack of meaningful participation and agreement of those whose rights are implicated.

As mentioned at the beginning, apologists for plea bargaining typically rationalize the practice as a voluntary exchange between willing parties, often using a line of reasoning that rings of libertarianism. For example, Frank Easterbrook has described plea bargaining as part of a well-functioning market system not unlike commodities transactions in a free market.<sup>64</sup> Defendants simply exchange something they possess—various constitutional rights—for something they place a higher value on—receiving a lower punishment,

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60. See U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2006) available at <http://www.ussc.gov/ANNRPT/2005/fig-c-post.pdf>; Matthew R. Durose & Patrick A. Langan, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004 1 (2007).

61. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); *United States v. Green*, 346 F. Supp. 2d 259, 265 (D. Mass. 2004) (describing the U.S. Department of Justice as "addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate"); William Glaberson, *Result of Military Trial Is Familiar to Civilians*, N.Y. TIMES, March 28, 2007, at A17 (describing a plea bargain as "the rubber-meets-the-road moment that makes it possible for courts all over America to cope with caseloads that would choke them if every defendant insisted on a trial").

62. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Michael O'Hear, *Plea Bargaining and Procedural Justice* 42 GA. L. REV. (forthcoming 2007).

63. For a libertarian critique of plea bargaining on constitutional grounds, see Timothy Lynch, *The Case Against Plea Bargaining*, REGULATION, Fall 2003, at 24, available at [www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf](http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf).

64. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). See generally Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) [hereinafter Easterbrook, *Criminal Procedure*]; Easterbrook, *Plea Bargaining as Compromise*, *supra* note 2.

avoiding trial-related costs (financial and psychological), resolving the case as quickly as possible, et cetera. Prosecutors also gain from plea bargaining, mostly by expending fewer resources to attain more convictions and a higher conviction rate. Everyone is better off as a result, or so it is argued, with market forces setting the price of crime through negotiated settlement between accuser and accused. "Why should we interfere with compromises of litigation?," Easterbrook asks. "If the accused is entitled to a trial at which all his rights are honored and the sentence is appropriate to the crime, yet prefers compromise, who are we to disagree?"<sup>65</sup> And given that this market process can only succeed if prosecutors and defendants have considerable autonomy to contract, there appears to be little reason to allow other parties to hold sway in the process.<sup>66</sup>

Some scholars have described this capitalistic vision as "chilling," condemning the idea that individual rights and criminal sanctions can be haggled over in "a glorious Turkish rug market."<sup>67</sup> Of course, libertarianism is the philosophical patron of free-market transactions and could hardly object to the abstract notion of voluntary exchange in criminal justice. Instead, a libertarian approach to punishment might find disconcerting several other aspects of plea bargaining in action. Two scholars who supported plea bargaining (with qualifications) under contract theory, Robert Scott and William Stuntz, nonetheless described the process as "scandalously casual," with most agreements reached through

a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge. To a large extent, this kind of horse trading determines who goes to jail and for how long.<sup>68</sup>

The sometimes cavalier nature of plea bargaining is worrisome in and of itself, but it also raises the likelihood of substantial agency costs for the rights-bearing principals. At the outset, there will be issues of

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65. Easterbrook, *Plea Bargaining as Compromise*, *supra* note 2, at 1976.

66. Easterbrook, *Criminal Procedure*, *supra* note 64, at 298.

67. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 125-26 (1992).

68. Scott & Stuntz, *supra* note 64, at 1911-12.

competence, whether a given attorney has the ability to serve his client's welfare or instead will be out-lawyered by opposing counsel. But even assuming a minimal level of professional aptitude, conflicts of interest appear endemic in the practice of plea bargaining. Defense counsel often has strong incentives to enter into plea negotiations and convince his clients to take a deal; for instance, counsel may be paid the same regardless of whether a case is pled out or goes to trial, although the latter will require time and effort that could be spent on other matters. Agency costs also exist with state attorneys, who may be enticed to plea bargain in order to maximize the number of prosecutions, obtain a high conviction rate, avoid embarrassing acquittals, maintain relationships with the defense bar, and so on, all with the goal of advancing one's career. None of this necessarily serves the interests of the government's clients.<sup>69</sup>

But who are these clients? A prosecutor represents some large body politic defined by territorial boundaries—a city, county, state, or even the entire nation—ostensibly serving some vague concept such as “the public interest” or “the common good.” Under a libertarian theory, however, these political entities would only be empowered to vindicate the individual rights that government has been enlisted to protect. As deserves repeating, a minimal state has no rights itself, only a delimited power to enforce the rights of individuals; moreover, libertarianism rejects the notion of “collective rights,” that new liberties can arise by the creation of communal entities. A right inheres in the individual, who may exercise or assign it to others, but no right springs forward by the founding of officialdom. Schmalzty terms like the “public interest” have little value in a minimal state, but their infinite malleability does provide cover for actions that may or may not be justified as enforcing the rights of individuals as compared to promoting the personal interests of a government official.

Conceivably, prosecutors might represent those whose rights were actually violated, the direct victims of crime (and, to a lesser extent, people who were placed in fear by the wrongdoing), pursuant to a delegation of authority to vindicate their individual rights. But that certainly is not the official position today. If I were to commit a crime at this symposium, maybe punching a fellow panelist, a prosecutor might bring a criminal case on behalf of the State of Wisconsin (or maybe the

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69. For a discussion of, *inter alia*, the impact of prosecutorial preferences on plea bargaining and punishment, see William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

County or City of Milwaukee), or if the panelist happened to be a federal official,<sup>70</sup> the case could be instituted for the United States of America. The prosecutor would not represent the actual victim of my crime, however, the individual whose rights were violated. And although the assaulted panelist might bring a tort suit against me, he would be limited to compensation regardless of his personal justification of punishment, such as a belief that retribution or incapacitation was required in the form of imprisonment.<sup>71</sup> In turn, supporters of plea bargaining often suggest that the practice achieves optimal deterrence,<sup>72</sup> which might be true and fully justified in my case, yet this utilitarian objective may not be shared by those whose rights are implicated.

A libertarian critique of plea bargaining, then, might view the prosecutor as impermissibly trading in other people's rights without their consent. "The entire structure of the criminal justice system presupposes that the relevant entitlements belong, in the meaningful sense of that term, to the defendant and prosecutor," an assumption that may not be sustainable if the foregoing is correct, at least without an alteration in the supposedly "bedrock rules" of plea bargaining.<sup>73</sup> To be sure, many victims and other interested parties might desire to have government attorneys as their agents in a criminal prosecution, or they may prefer to avoid involvement altogether, and the ultimate outcome may square with their own theories of justice. Moreover, I would venture to guess that most prosecutors are conscientious of victims' opinions and seek their input in the process. Some states even require this by statute or constitutional provision, with precedents holding that "the rights provided to crime victims . . . cannot be plea bargained away without the crime victim's actual approval."<sup>74</sup> But the overlap between the goals of criminal attorneys and those whose rights are at issue is not inevitable, nor is the meaningful involvement of the rights-bearing principals. In many cases, victims can be marginalized or wholly ignored

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70. The federal official would need to have been assaulted "while engaged in or on account of the performance of official duties." 18 U.S.C. § 111 (2000).

71. In some jurisdictions, the victim might also be able to recover punitive damages, which "may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). But successful civil suits do not carry the possibility of incarceration or the ignominy of a criminal conviction.

72. See, e.g., Easterbrook, *Criminal Procedure*, *supra* note 64, at 304-05.

73. Scott & Stuntz, *supra* note 64, at 1917.

74. *Wilson v. Commonwealth*, 839 S.W.2d 17, 21 (Ky. Ct. App. 1992); see DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* 476-97, 724-33 (2d ed. 2006).

in the process and their dispositional opinions can be rejected.<sup>75</sup>

Plea bargaining, like almost all aspects of American criminal justice, is dominated by the system's repeat players. Although criticism of this reality from a libertarian perspective may be somewhat novel, the critique itself has been around for quite a while. Three decades ago, criminologist Nils Christie wrote a fascinating essay where he suggested that conflicts were a form of property that had been stolen by professionals, especially lawyers.<sup>76</sup> In the modern criminal justice system, the real parties are either overrepresented or marginalized. Although his rights are at stake, an offender's role in his own case can be quite limited due in large part to the complexity of the criminal process and a paternalistic (but usually correct) belief that trained advocates know best, with the defendant's in-court participation often no more than a few scripted words (e.g., "not guilty, your honor") and any greater involvement regarded as perilous. The victim's involvement is even less, having been

pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.<sup>77</sup>

Although Christie's full argument is not libertarian, the idea that the

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75. See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717–18 (2006).

[T]he inability of crime victims to mount private prosecutions or to compel public prosecution reinforces the charging discretion and bargaining power of prosecutors—as does the relatively limited ability of crime victims to influence the terms of plea agreements. There is little outside check on the benefits prosecutors may exchange for a guilty plea.

*Id.* (citation omitted); see, e.g., *State v. Casey*, 44 P.3d 756, 757–58 (Utah 2002) (describing case where prosecutor changed plea deal without consulting victim); Tom Jackman, *Prosecutor Who Was Criticized for Rape Case Deal Resigns*, WASH. POST, May 3, 2007, at B1 (similar); see also GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 247–48 (1995); Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177 (1992); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

76. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

77. *Id.* at 3; see also *id.* at 7–9.



real parties in a criminal episode have a property interest in the conflict—not just in achieving a particular outcome but also in participating in the process—is consistent with libertarianism’s commitment to rights held by discrete individuals, who should have a say in how those rights are to be enforced or extinguished. When prosecutors and defense attorneys plea bargain about punishment, they are negotiating over the disposition of other people’s property, the rights of victims and offenders.

## VI.

As suggested in the introduction, some might find it peculiar that a libertarian theory would be critical of supposed agents using other people’s property,<sup>78</sup> given that agency is central to modern free-market systems, where individuals entrust skilled representatives to manage their assets. But there are limits to the analogy between laissez faire capitalism and plea bargaining. To begin with, libertarianism (and any decent theory of contract) does not allow one to trade in another’s property if he does not have an agency relationship with the owner. As argued above, crime victims need not (and do not) delegate all of their rights to government, eliminating them as parties in the criminal process and without any say as to the justification of punishment upon which to vindicate their rights. A given victim might choose to do so, but this is not an obligatory component of a minimal state.

Defendants, on the other hand, are parties to the dispute and might be presumed to be voluntarily represented and capable of arms-length bargaining. But the free-market comparison still doesn’t quite work; this is not a case of selling widgets (insert your favorite commodity), where an individual can freely exit the widget business, can shop for potential buyers of his widgets, and, in most cases, has a variety of options when choosing an agent to represent him in widget-related transactions. A criminal defendant has no choice but to participate in the criminal process, and he cannot shop around for a different

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78. Ironically, this type of claim was made by big-government progressives *against* laissez faire economics, exemplified by President Franklin Roosevelt’s claim that a small group of capitalists “had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives.” Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 230, 233 (Samuel I. Rosenman ed., 1938); see also LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT (1914).

prosecutor.<sup>79</sup> Once an individual has been accused of a crime, he must either negotiate with the state attorney, who holds a monopoly on the charging and bargaining power, or instead take his chances at trial. Moreover, substantial agency costs may be imposed on criminal defendants whose attorneys have incentives to bargain rather than try cases in the face of overwhelming dockets and paltry remuneration. Oddly, Judge Easterbrook recognized the “scandalous” nature of some payment scales for appointed counsel,<sup>80</sup> and yet pooh-poohed the deficient representation that might result. “Agency costs are endemic” in many contexts, he notes, and “[c]ritics of plea bargaining commit the Nirvana Fallacy, comparing an imperfect reality to a perfection achievable only in imaginary systems.”<sup>81</sup>

An immaculate criminal justice system is too much to expect, for sure, but one wonders whether proponents of plea bargaining might suffer from their own cognitive limitation—a status quo bias, possibly coupled with a lack of imagination, that makes the current situation seem preferable to any other alternative.<sup>82</sup> The existing system may be optimal for some, particularly the professionals involved in the criminal justice system. But if you accept the preceding theory of libertarianism, as well as the concerns it has with a state-dominated criminal process and the practice of plea bargaining, then the present situation is deeply flawed. The government chooses both the justification of punishment and the sanction imposed in criminal cases; the real rights-holders and their views can be marginalized or even excluded in the process; and professionals are allowed to trade in other people’s rights. Although this is not a pretty picture, Easterbrook’s admonition should not go unheeded: Is there a feasible approach that acknowledges the rights of the individual and the pursuit of his own utopia that doesn’t commit the Nirvana Fallacy?

In my final few pages, I would like to suggest that a process might exist with the potential to contribute at least a small part in an unfinished libertarian project. It also happens to be a topic of this symposium: “restorative justice.” Broadly defined, it is an approach to punishment that includes all stakeholders in a particular crime in a group decision-making process to reach a mutually agreeable

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79. See, e.g., Easterbrook, *Plea Bargaining*, *supra* note 2, at 1975.

80. *Id.* at 1973–74.

81. *Id.* at 1975–76.

82. Cf. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625–30 (1998).

resolution.<sup>83</sup> Advocates suggest that restorative justice has historical origins and draws upon the punishment practices of non-Western cultures, which view harmful wrongdoing as a breach of social relationships that calls for the involvement of the affected parties in resolving the dispute. From this perspective, a crime is first and foremost an act against specific victims, whose rights were violated, and the surrounding community, whose members may feel less secure in the exercise of their rights. Likewise, the offender will now face an undesirable consequence for his actions, a diminution of his liberty through punishment. In a restorative justice program, each of these individuals can be directly involved in the sanctioning process, possibly with the assistance of supporters like family and friends, to express their views and contribute to an appropriate outcome.

Over the past quarter century, various restorative practices have emerged in Western nations, including the United States, that arguably comport with this understanding. One particularly popular scheme, “victim-offender mediation,” involves victims and offenders voluntarily brought together in a secure environment to discuss the crime and possible resolution, with the process facilitated by a trained mediator.<sup>84</sup> Today, hundreds of victim-mediation programs exist throughout the U.S., Canada, and Europe.<sup>85</sup> Another practice, often termed “family group conferencing,” also uses facilitated dialogue and collective decision making, expanding the group of participants to include, *inter alia*, victims, offenders, family members and other supporters, and law enforcement representatives. A coordinator will prepare for a conference by consulting with the stakeholders to determine a suitable time and place to hold the event and to provide all information necessary for their voluntary participation. Although the conference itself may be structured to the needs of the attending stakeholders, it typically begins with introductions and an explanation of the procedure, followed by a factual summary of the offense and comments on its

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83. See, e.g., John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (1999). For recent law review symposia on restorative justice, see Symposium, *Restorative Justice in Action*, 89 MARQ. L. REV. 247 (2005); *Fall 2003 Dispute Resolution Institute Symposium: Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL’Y 235 (2004); *The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1.

84. Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 2–3, 7–12; see also MARK S. UMBREIT WITH ROBERT B. COATES & BORIS KALANJ, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994).

85. Bazemore & Umbreit, *supra* note 84, at 2.

accuracy. The victim, offender, and other stakeholders are then provided an opportunity to express their opinions about the crime and possible resolutions, leading to an open discussion and negotiation aimed at producing an outcome agreed to by the participants.<sup>86</sup>

To be clear, restorative justice programs like family group conferencing and victim-offender mediation do have conceptual limitations. These sanctioning processes presume an offender's factual and legal responsibility for the underlying offense; restorative justice simply lacks the capacity to determine questions of guilt as is expected of standard criminal trials. Moreover, participation of the core participants—victims and offenders—must be of their own volition. If they prefer not to be involved or a mutually agreeable resolution cannot be reached, an alternative process must exist to adjudicate a criminal sanction. A defendant's refusal to participate cannot mean that a victim's rights will go without vindication, for instance, while the direct victim's repudiation of his interests in punishment may have no bearing on the rights of other individuals, such as those who now live in fear because of the offender's wrongdoing. A victim of residential arson who disclaims his interests against a pyromaniac, for example, does not thereby divest the rights of neighbors who are justifiably panicked that their homes will be next. In these situations, the standard criminal process may come into play.

There are also considerations of programmatic experience. In many places, restorative justice initiatives have been limited to relatively low-level property offenses and crimes committed by juveniles. The programs also tend to be employed as a type of diversion away from formal prosecution or, in some situations, as a condition of probation after an accepted guilty plea, and rarely is incarceration among the possible sanctions that stakeholders may agree upon. But these confines have been a matter of pragmatic implementation rather than theoretical boundaries. There is no reason why restorative justice should be limited to juvenile property crimes, for instance, or that terms of imprisonment could not be included as possible outcomes. In fact, if restorative justice is to be anything other than a fringe component in modern sentencing, it must be open to adult offenders, the most serious crimes, and incarcerative penalties, which remain at the forefront of any discussion

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86. See, e.g., Bazemore & Umbreit, *supra* note 84, at 5–6, 7–12; Luna, *supra* note 48, at 295–301; GABRIELLE M. MAXWELL & ALLISON MORRIS, *FAMILY, VICTIMS AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND* (1993); Joy Wundersitz & Sue Hetzel, *Family Conferencing for Young Offenders: The South Australian Experience*, in *FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY & PRACTICE* 111 (Joe Hudson et al. eds., 1996).

about American criminal justice.<sup>87</sup>

For the libertarian theory of punishment sketched above, however, the most important obstacle may come from restorative justice advocates themselves. Most view restorative justice as implementing a particular vision of crime and punishment. For example, some see it as fulfilling a Biblical notion of criminal justice, whether it be a Mosaic method of an “eye for an eye” or instead a New Testament-style forgiveness and turning of the other cheek.<sup>88</sup> Others describe restorative justice as conforming to the decision- and peace-making practices of indigenous cultures, from the Maori of New Zealand to the Navajo of North America.<sup>89</sup> Still others view it as a set of secular practices

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87. A commentator questioned the notion that restorative justice would be open to incarceration, asking, “What does incarceration restore?” A few responses come to mind. First, and least convincing, some restorative justice advocates allow for the potential of incarceration. See Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 MCGEORGE L. REV. 787, 816 n.116 (2006). Second, it is possible that incarceration may be necessary to “compensate” those affected by crime. Suppose that the offender is incapable of providing monetary restitution to the victim or that the crime is financially incommensurable:

What then? Obviously one likely outcome is frustration on the part of the victim. And one standard source of relief for such is to lash out at its causes, in this case the malefactor. If A can't have the life he'd like to have had, one of the preferred ones in between the life he now faces—if any—and his preferred original one free of B's intervention, might well be one in which B suffers. In this special (?) case, the suffering of another, which is ordinarily not a legitimate object of pursuit, becomes so as part of a compensation package. . . . Given that B may properly be forced to do whatever is necessary to achieve restitution up to the correct level then this may be part of it.

Jan Narveson, *Moving from Punishment to Compensation*, 5 CAN. J.L. & JURISPRUDENCE 57, 66–67 (1992). Moreover, incarceration may be the only way to (partially) restore the sense of security undermined by the crime. See *supra* notes 53–54 and accompanying text. Finally, the procedural conception of restorative justice suggested below does not necessarily advance the principles of substantive restorative justice (e.g., “healing, not hurting”). Instead, it provides a process whereby all legitimate justifications of punishment may be heard and all legitimate sanctions may be imposed. As such, it might be appropriate to replace “restorative justice” with a term that does not necessarily connote a particular substantive theory or set of outcomes. Relabeling will have to await another day, however.

88. See, e.g., CHARLES W. COLSON, JUSTICE THAT RESTORES 130–37 (2000); JIM CONSEDINE, RESTORATIVE JUSTICE: HEALING THE EFFECTS OF CRIME 147–56 (1995); CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT 131–43 (2001); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 177–214 (1990); THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE (Michael L. Hadley ed., 2001).

89. MAXWELL & MORRIS, *supra* note 86; Janelle Smith, *Peacemaking Circles: The “Original” Dispute Resolution of Aboriginal People Emerges as the “New” Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL’Y 329 (2003); Juan Tauri & Allison Morris,

oriented toward restitution, for instance, or having various psychological benefits for participants and a greater impact on consequential goals like deterrence.<sup>90</sup> Of particular note are the works of John Braithwaite, who has developed both positive and normative theories of restorative justice. The former is based on his analysis of “reintegrative shaming,” with restorative justice reducing crime by effectively shaming offenders and then reintegrating them into law-abiding society.<sup>91</sup> The latter is premised on a republican theory of criminal justice (developed with philosopher Philip Pettit), which provides an argument for restorative justice as maximizing “dominion,” understood as a social and relational model of liberty.<sup>92</sup>

An entirely different conception of restorative justice, however, would not embody a particular justification of punishment. Instead, it would view restorative justice as providing a procedural approach that does not take a stand on the merits of utilitarianism, retributivism, republicanism, communicative and compensatory models, et cetera. Each punishment rationale is sure to have certain virtues for its sponsors and vices for its detractors, and as mentioned earlier, people in good conscience can and will adopt their own visions of justice in sentencing. Some will be more deontologically disposed, others will have consequentialist perspective, and there is no reason to believe that those most directly affected by a given crime and subsequent sanction would

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*Re-forming Justice: The Potential of Maori Processes*, 30 AUSTL. & N.Z. J. CRIMINOLOGY 149 (1997); Robert Yazzie, “Hozho Nahasdlíi”—We Are Now in Good Relations: Navajo Restorative Justice, 9 ST. THOMAS L. REV. 117 (1996); Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equality and Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 157 (Burt Galaway & Joe Hudson eds., 1996); JOHN BELGRAVE, NEW ZEALAND MINISTRY OF JUSTICE, RESTORATIVE JUSTICE: A DISCUSSION PAPER § 5.4 (1996), available at <http://www.justice.govt.nz/pubs/reports/1996/restorative/chapter5.html>.

90. John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244 (2002); Luna & Poulson, *supra* note 87, at 799–807; Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167; Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO 97 (1998); cf. William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137.

91. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 54–68 (1989).

92. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 91–92 (1990). One commentator asked me whether a libertarian could endorse a theory of maximizing dominion, to which I responded “sure,” so long as the state does not itself endorse and attempt to impose this theory (or any other) on individuals whose rights were implicated by a given crime and punishment.

subscribe to identical punishment rationales or apply them in the same way. What does seem feasible is that a dialogic process might lead these individuals to agree on a particular resolution without necessarily agreeing on its justification. By bringing together victims, offenders, their supporters, and various stakeholders, and then providing them an opportunity to express their opinions in an undominated forum, restorative justice offers a broad framework for parties to find common ground on outcomes while maintaining their own subjective interpretations of justice. In this way, those affected by crime may be able to achieve a resolution that represents a type of “overlapping consensus” of all parties, each individual coming to a particular resolution through a process of reflection on moral intuitions and judgments.<sup>93</sup>

This procedural conception of restorative justice thus seems consistent with a libertarian theory of punishment: Those whose rights are infringed by the crime (e.g., victims) or the punishment (offenders) are afforded the opportunity to participate in (or abstain from) a system of rights vindication or forfeiture. Officials may facilitate this process, institute procedural boundaries for peaceful resolution, and provide an enforcement mechanism. The state may also establish a default decision-making structure—most likely, the traditional criminal justice system—should party agreement prove impossible. There could even be a role for a state agent to serve as the surrogate for a group of stakeholders who are particularly diffuse or difficult to identify, those whose rights were endangered by reckless behavior, for example. But government is involved only to make possible a resolution that the rights-holders deem just under their personal rationales for punishment. A truly minimal state can neither vindicate its own rights, because it has none, nor trade in people’s rights that it does not legitimately possess.

## VII.

To the extent that it reverts control over punishment to the rights-holders themselves, restorative justice offers a small step away from omnipotent governance. But it cannot and need not provide a solution in every dispute. Take, for instance, the aforementioned case of the battering ballplayer. The actual incident in question involved a Pittsburgh Pirate first baseman who hit a young stadium worker dressed

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93. JOHN RAWLS, *POLITICAL LIBERALISM* 133 (1996) (concept of “overlapping consensus”); *see also* JOHN RAWLS, *A THEORY OF JUSTICE* 40 (rev. ed. 1999) (“reflective equilibrium”).

up as an Italian sausage during the popular costume race at Milwaukee baseball games. A Brewers official described it as “one of the most outrageous things I’ve ever seen inside a ballpark or outside a ballpark,”<sup>94</sup> and “an insane act of a person whose conduct is unjustifiable.”<sup>95</sup> The ballplayer was arrested, taken to jail, and booked for misdemeanor battery.<sup>96</sup> But the victim said she received “just a few scratches” and thought “the whole thing is funny,” stating that she didn’t want charges to be filed and instead asked for an apology and an autographed bat from the offending Pirate.<sup>97</sup> And when the contrite ballplayer met these demands, “Sausagegate” was resolved in a manner respectful of the individual rights at issue and without the need for further action.

On the other hand, there may be situations where restorative justice will be considered undesirable by victims (or offenders), but the crimes still call for punishment. As mentioned, party involvement must be voluntary in a restorative process, and a victim may have no desire to interact with the individual who violated his rights. When I suggested at a lecture in New Zealand that family group conferences should be extended to adult offenders, an outraged antipodean wrote a letter to the editor telling me to “get real”: “If you take the time to ask victims of serious crime if they want to be in the same room and breathe the same air as the person responsible for the plight they find themselves in, I think the answer would be ‘no way!’”<sup>98</sup> This person may be right in many cases, and there are categories of crime (e.g., sex offenses) that I myself would find inappropriate for restorative justice. But the one who should be making this judgment is neither me nor my Kiwi critic, but the individual whose rights were violated.<sup>99</sup>

This choice to be involved in the vindication (or forfeiture) of one’s

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94. Brian O’Neill, *Why Do Players Treat Performers Like, Uh, Pieces of Meat?*, PITTSBURGH POST-GAZETTE, July 13, 2003, at C1.

95. Frank Litsky, *A Tap, a Fall and Fury in Milwaukee*, N.Y. TIMES, July 11, 2003, at D1.

96. Litsky, *supra* note 95.

97. ‘Sausagegate’ Nets 3-Game Suspension, CAPITAL TIMES (Madison, Wis.), Jul. 12, 2003, at C2; Drew Olson & Reid J. Epstein, *Over the Coals: Some Aren’t Laughing as Player Fined for Sausage-Smacking*, MILWAUKEE J. SENTINEL, July 11, 2003, at 1A.

98. Wendy Clark, Letter to the Editor, *Family Conferences*, DOMINION (Wellington, N.Z.), July 26, 2000, at 14; Paul Mulrooney, *American Expert Advocates Restorative Justice*, *Family Conferences*, DOMINION (Wellington, N.Z.), July 17, 2000, at 12.

99. Moreover, restorative justice is not the only method of party involvement and interaction in sentencing issues. Cf. Tom Kenworthy, *‘I’m Going to Grant You Life’: Parents of Slain Gay Student Agree to Prison for His Killer*, WASH. POST, Nov. 5, 1999, at A2 (describing plea deal brokered by murder victim’s family).



own rights and the opportunity to reach an outcome consistent with one's own vision of justice seem to me to be key aspects to a libertarian theory of punishment. That was the problem with scholarship arguing that a particular sentencing justification should be derived from libertarianism, given that this political theory endorses pluralism of thought and accepts only a minimal state. In turn, the practice of plea bargaining permits government to trade in people's rights without their consent or participation, marginalizing the input of defendants and ignoring the opinions of victims. Of course, not all plea bargains will be reached despite contrary positions of the real rights-holders—but the justification of punishment that will tend to prevail, sometimes tainted by self-interest, will be the rationale employed by prosecutors and defense attorneys.

The most endearing quality of libertarianism is the freedom it provides all sorts of individuals to structure their lives without direction from the state, whether they are Amish or Jewish, Hippies or Yuppies, vegans or pagans, Black Panthers or Gray Panthers, tree-huggers or flat-earthers, you name it. A libertarian theory of punishment would have similar aspirations, allowing believers' in retribution, utilitarianism, restitution, and all other decent justifications to embrace such views without state approval or rejection, and to have their perspectives respected when their own rights are at stake. Many details of libertarian punishment will need to be worked out, I admit, but at least the traces are there.